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Nos. 87-1314, 87-1323, 87-1324 and 87-6597

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANDREW RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

CARMINE PERSICO, PETITIONER

v.

UNITED STATES OF AMERICA

ALPHONSE PERSICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

HUGH MCINTOSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars the RICO conspiracy convictions of Russo and McIntosh (Nos. 87-1314, 87-6597).

2. Whether the RICO conspiracy convictions of Russo and McIntosh are barred by the five-year statute of limitations (Nos. 87-1314, 87-6597).

3. Whether the statements of Carmine Persico to government witness Frederick DeChristopher were properly admitted (Nos. 87-1323, 87-1324).

4. Whether the government's compensation arrangement with a witness required the exclusion of his testimony (No. 87-1323).

5. Whether the district court abused its discretion in not sequestering the jury for the duration of the eight-month trial (No. 87-1324).

6. Whether Carmine Persico was deprived of due process by government misconduct (No. 87-1323).

7. Whether the evidence was sufficient to show that Alphonse Persico had the requisite intent to commit bribery (No. 87-1324).

8. Whether the jury should have been charged that it had to find the predicate acts to be in furtherance of the enterprise (No. 87-1323).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a)[1] is reported at 832 F.2d 705. The opinion of the district court is reported at 646 F. Supp. 752.[2]

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-38a) was entered on October 27, 1987. The orders denying petitions for rehearing and suggestions for rehearing en banc were entered on December 9 (Pet. App. 39a-40a) and December 11, 1987 (87-6597 Pet. App. B). The petition for a writ of certiorari in No. 87-1314 was filed on February 5, 1988. The petitions for a writ of certiorari in Nos. 87-1323 and 87-1324 were filed on February 8, 1988. The petition for a writ of certiorari in No. 87-6597 was filed on February 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, the six petitioners were convicted of conspiring to conduct and participate in the affairs of a racketeering enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 1).[3] Carmine Persico, Alphonse Persico, Scarpati,

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[1] "Pet. App." refers to the appendix to the petition in No. 87-1314.

[2] Certain of the contentions raised in the petitions were also considered on pretrial motions made by petitioners and others. See 620 F. Supp. 836 (S.D.N.Y.), aff'd, 774 F.2d 30 (2d Cir. 1985); 621 F. Supp. 842 (S.D.N.Y. 1985).

[3] At the close of the proof, the government voluntarily dismissed various counts and predicate acts of racketeering activity contained in

Russo, and McIntosh were also convicted of the substantive crime of conducting and participating in the affairs of a racketeering enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 2). In addition, Carmine Persico was convicted of conspiring to extort money from concrete construction firms, in violation of 18 U.S.C. 1951 (Count 3). Carmine and Alphonse Persico were convicted of paying a gratuity to a federal prison official, in violation of 18 U.S.C. 201(b)(1), (b)(3) and (f) (Count 17), and of offering a $20,000 bribe to a federal official in order to have Carmine Persico transferred to the prison of his choice, in violation of 18 U.S.C. 201(b)(3) (Count 18). Scarpati was convicted of conspiring to make extortionate extensions of credit and conspiring to collect extensions of credit by using extortionate means, in violation of 18 U.S.C. 891 and 892 (Counts 19 and 24), and on several counts of making and collecting extortionate extensions of credit, in violation of 18 U.S.C. 891, 892, and 894 (Counts 22, 23, 27, and 28).

Carmine Persico was sentenced to a total of 39 years' imprisonment. Alphonse Persico and DeRoss were each sentenced to 12 years' imprisonment. Scarpati was sentenced to a total of 35 years' imprisonment. Russo was sentenced to a total of 14 years' imprisonment, and McIntosh was sentenced to ten years' imprisonment to run consecutively to a nine-year term he was already serving on a bribery conviction in the Eastern District of New York.

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the 51-count superseding indictment. Accordingly, a redacted indictment containing renumbered racketeering acts and renumbered substantive counts was submitted to the jury in place of the full superseding indictment. All references to count numbers are taken from the redacted indictment.

The court of appeals affirmed all the convictions except the substantive RICO convictions of Russo and McIntosh (Pet. App. 1a-38a).

1. The proof at trial, which is summarized in the opinion of the court of appeals (Pet. App. 4a-9a), established that petitioners and others participated over an extended period of time in a criminal business known as the Colombo Family. Operating in New York City and other places around the country, the Colombo Family engaged in a wide variety of criminal conduct, including loansharking, narcotics trafficking, extortion, labor racketeering, theft, and bribery. The evidence also showed that the Family dominated and obtained funds from at least eight different New York labor unions.

Petitioners were the principal leaders and key members of the enterprise. They ordered, facilitated, or executed, in the name of the Colombo Family, the dozens of individual crimes that were proved at trial. The evidence showed that petitioner Carmine Persico was the Boss of the Family; petitioner Alphonse Persico, Carmine's eldest son, was a trusted adviser and an initiated member of the Family; petitioners Scarpati, DeRoss and Russo were captains in the organization; and petitioner McIntosh, although not a member, was an associate of the Family. Pet. App. 5a.

2. On appeal, Russo and McIntosh contended that the Double Jeopardy Clause barred their RICO convictions. The predicate acts underlying those convictions had been the subject of a prior investigation and prosecution in the Eastern District of New York that resulted in guilty pleas by Russo and McIntosh to several of those acts. The Eastern District investigation revealed that Russo, McIntosh, and others had paid numerous bribes to an undercover IRS agent who was posing as a corrupt law enforcement official. Russo, McIntosh, and Carmine Persico bribed the agent to prevent the commencement of a

federal criminal prosecution against Russo, and to influence the disposition of Carmine Persico's application to vacate his sentence in an unrelated case. McIntosh and Carmine Persico also bribed the agent to prevent Persico's transfer from a federal prison in Manhattan. Russo paid another bribe to the agent to prevent the commencement of a federal criminal prosecution against Colombo Family member Dominic Cataldo. And Russo also bribed the agent to prevent the commencement of a state perjury prosecution and to eliminate back tax liability for one of his associates and a related corporate entity. Pet. App. 10a. Russo and McIntosh were indicted in the Eastern District of New York for their roles in the bribery scheme. Russo eventually pleaded guilty before trial to conspiracy to bribe a public official (18 U.S.C. 371) and obstruction of justice (18 U.S.C. 1505). After four days of trial, McIntosh pleaded guilty to bribery of a public official. The remaining charges against both defendants were dismissed on the government's motion. Pet. App. 10a.

The court of appeals rejected Russo's and McIntosh's contention that they had been twice prosecuted for the same offense. The court found that "the government supplied ample evidence of Russo's and McIntosh's continued participation in the affairs of the Colombo Family enterprise after their guilty pleas in the Eastern District" (Pet. App. 14a). The court therefore found it unnecessary to decide whether such post-plea involvement is necessary to defeat a double jeopardy challenge to RICO convictions when the convictions are based on predicate acts that were the subjects of prior guilty pleas (*ibid.*). The court also upheld the district court's decision to rule on the merits of Russo's and McIntosh's double jeopardy claim after trial, rather than submitting that claim to the jury. Because the assertion of a valid double jeopardy claim at any stage precludes trial and removes the determination of guilt or

innocence from the jury, the court found it appropriate for the district court to rule on such claims "before, during or after trial," as may be appropriate under the circumstances (*id.* at 17a).[4]

Russo and McIntosh also claimed that their RICO convictions on Counts 1 and 2 were barred by the statute of limitations because the last predicate acts ascribable to them occurred more than five years before their indictment. Although Russo and McIntosh prevailed on their claim that the statute of limitations had run with respect to the substantive RICO convictions (Count 2) (Pet. App. 19a-21a), the court of appeals upheld their convictions on the RICO conspiracy count (Count 1). Starting from the proposition that the statute of limitations for RICO conspiracy should not begin to run until the termination of the conspiracy, the court found that "the government amply demonstrated that the conspiracy to conduct the affairs of the Colombo Family continued until, and well after, April 4, 1985, the date the superseding indictment was filed." Accordingly, the court held that the convictions of Russo and McIntosh for RICO conspiracy were not barred by the applicable five-year statute of limitations. *Id.* at 17a-19a.[5]

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[4] Judge Newman dissented on the latter point. He stated that while the prosecution could proceed if Russo and McIntosh participated in the affairs of the RICO enterprise after the predicate act offenses to which they had pleaded guilty, it was for the jury to determine whether their participation had in fact continued as the government alleged (Pet. App. 30a-36a).

[5] Judge Newman also dissented on this point. He argued that each defendant charged with RICO conspiracy must not only have joined the overall criminal enterprise conspiracy but must also have joined specific conspiracies to commit at least two predicate acts. Russo's and McIntosh's RICO conspiracy convictions should not stand, he believed, because the government failed to prove that a specific conspiracy to commit an identified predicate act continued into the limitations period (Pet. App. 36a-38a).

Each of the petitioners also claimed that the district court committed reversible error by admitting the testimony of co-conspirator Frederick DeChristopher about conversations he had with Carmine Persico when Persico was in hiding at DeChristopher's house. The court of appeals disagreed. It held that the district court did not abuse its discretion in finding that those statements were made between co-conspirators in the course of and in furtherance of a conspiracy, and that they were therefore admissible under Fed. R. Evid. 801(d)(1)(E) (Pet. App. 22a-23a). The court of appeals noted that "the government amply demonstrated that the conspiracy was ongoing at least until the time of trial" (*id.* at 23a-24a). It further found that DeChristopher had been an active member of the conspiracy and that the statements made by Carmine Persico were indisputably in furtherance of that conspiracy (*id.* at 24a-25a).

Carmine Persico contended below that the government's cooperation arrangement with witness Joseph Iannuzzi was improper and amounted to a contingency fee that was likely to induce Iannuzzi to give false testimony against petitioners in the hope of financial gain. Iannuzzi was a long-time Gambino Family associate who agreed to cooperate with the FBI by providing information and testimony regarding organized crime figures. In return, Iannuzzi was promised a monthly salary and a lump-sum payment after all the trials were completed. The amount of the lump-sum payment would be based on the FBI's evaluation of the "overall quality" of any cases that had been developed. A written version of the agreement described the lump-sum payment as covering reasonable travel and relocation expenses, and it stated that the FBI would determine the amount of the payment. The relationship between Iannuzzi and the FBI was revealed to the

jury at trial, and Iannuzzi was thoroughly cross-examined with respect to that relationship. Pet. App. 25a-26a.

The court of appeals held that the effect of the agreement on Iannuzzi's credibility was properly a matter for the jury to decide (Pet. App. 27a-28a). Furthermore, the court noted that "the promise of compensation related to the 'overall quality' of cases that were developed and did not depend on the outcome of any prosecution or the inclusion of any preselected person in the accusation" (*id.* at 28a).

Finally, Carmine Persico challenged the district court's decision not to sequester the jury during the eight-month trial, as well as its decision to sequester the jury during deliberations. The court of appeals rejected those contentions, and held that the district court's handling of the sequestration issue was fair and sensible (Pet. App. 29a).[6]

ARGUMENT

1. Russo and McIntosh renew their contention (87-1314 Pet. 17; 87-6597 Pet. 8-12) that the Double Jeopardy Clause bars their prosecution under RICO because the racketeering acts that they were found to have committed arose from a bribery scheme that was the subject of an earlier prosecution in the Eastern District of New York.[7] As the court below held (Pet. App. 12a-13a),

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[6] The court of appeals rejected petitioners' remaining claims without discussion (Pet. App. 29a).

[7] Russo, it should be noted, does not have a plausible double jeopardy claim under any analysis. The crimes to which Russo pleaded guilty in the Eastern District of New York were not included as predicate acts in the indictment below. Russo pleaded guilty to two counts, one of conspiracy, in violation of 18 U.S.C. 371, and one of obstruction of justice, in violation of 18 U.S.C. 1505, neither of which was charged as a predicate act in this case. The remaining charges in

however, the Double Jeopardy Clause does not preclude the use of an offense that was the subject of a prior conviction as a predicate act in a RICO prosecution.

In *Garrett* v. *United States*, 471 U.S. 773, 792-793 (1985), a defendant pleaded guilty to one count of importing marijuana in one federal district, and was subsequently indicted in another federal district for engaging in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. 848, proof of which requires, inter alia, the commission of a series of drug offenses. The defendant's prior importation conviction was one of the predicate offenses used to prove his involvement in the continuing criminal enterprise. 471 U.S. at 776. This Court rejected the argument that the use of the prior conviction rendered the CCE case a second prosecution for the same offense in violation of the Double Jeopardy Clause.

In reaching that conclusion, this Court found that Congress had intended the CCE statute to be a separate offense from the "predicate" offenses that constitute its elements (471 U.S. at 779-786). The Court then determined whether the prosecution for that separate offense violated the Double Jeopardy Clause when it followed a conviction for one of the predicate crimes. The Court examined the charges that formed the basis for the CCE prosecution and concluded that the course of conduct being prosecuted as a CCE violation was substantially broader than that prosecuted in the initial importation case and that it continued for some months after the end

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the Eastern District, which did overlap with some of the predicate acts in this case, were dismissed prior to trial. Accordingly, jeopardy never attached with respect to those charges. Moreover, the court of appeals ruled before trial that there was no plea agreement in the Eastern District case that precluded this prosecution, and petitioner Russo does not argue otherwise now. 774 F.2d at 33.

of the prior offense. The continuing nature of the CCE offense, the Court held, foreclosed Garrett's double jeopardy claim (*id.* at 788-792).

As the court of appeals found, the conclusion that no double jeopardy violation has occurred in this case follows from the analysis in *Garrett* (Pet. App. 12a-13a). The intent of Congress is even more clearly stated in RICO than it is in the CCE statute. It is difficult to imagine words more explicit than those chosen by Congress to express the intention that RICO was meant to supplement, not replace, existing criminal statutes:

> Nothing in this [RICO statute] shall supersede any provision of Federal, State, or other law imposing criminal penalties * * * in addition to those provided for in this [statute].

Organized Crime Control Act of 1970, § 904(b), 18 U.S.C. 1961 note. Based on that language, courts of appeals have uniformly found that Congress intended to create a new offense separate from the predicate act offense for double jeopardy purposes. See *United States* v. *Thomas*, 757 F.2d 1359, 1370-1371 (2d Cir.), cert. denied, 474 U.S. 819 (1985); *United States* v. *Walsh*, 700 F.2d 846, 856 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States* v. *Hartley*, 678 F.2d 961, 992 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *United States* v. *Hawkins*, 658 F.2d 279, 287 (5th Cir. 1981); *United States* v. *Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

Construing the RICO statute in accordance with Congress's intent is consistent with the Double Jeopardy Clause, because like the CCE statute at issue in *Garrett*, RICO describes an offense much broader in scope and different in character from the crimes charged as predicate offenses. See *United States* v. *Turkette*, 452 U.S. 576, 583

(1981). In this case, for example, the difference between the crimes to which Russo and McIntosh pleaded guilty and the RICO charge is the difference between a three-year scheme to pay a series of bribes to an IRS agent and a 17-year agreement to participate in the affairs of an organized crime family that dominated unions in two of New York City's largest industries, stole from interstate commerce, engaged in loansharking, gambling, and narcotics businesses, bribed a variety of public officials, and kept their victims in fear by means of threats, beatings, and murder.

Both the district court and the court of appeals (Pet. App. 14a) found that the evidence showed that Russo and McIntosh had participated in and remained members of the Colombo Family enterprise through early 1985, well after the conduct that led to their prior Eastern District convictions. Russo and McIntosh contend (87-1314 Pet. 17; 87-6597 Pet. 12-16) that the question whether there was such continuing participation in the criminal enterprise should have been submitted to the jury. The court of appeals correctly ruled, however, that because " 'double jeopardy claims [do] not implicate the issue [of a defendant's] guilt or innocence, which a jury must decide, but rather the right of the government to bring the action itself' " (Pet. App. 15a, quoting *United States* v. *MacDougall*, 790 F.2d 1135, 1142 (4th Cir. 1986)), the issue is a matter for determination by the court. Although Judge Newman dissented on that point, he conceded that there was no federal authority for his position that the jury should decide the double jeopardy question (Pet. App. 30a). Petitioners have likewise failed to point to any conflict among the circuits on this issue; review by this Court is therefore unwarranted.

2. Russo and McIntosh contend (87-1314 Pet. 15-16; 87-6597 Pet. 16-21) that their RICO conspiracy pros-

ecutions were barred by 18 U.S.C. 3282, the applicable five-year statute of limitations. They argue that notwithstanding the continuing criminal activity of the racketeering enterprise of which they were continuously members, their RICO conspiracy prosecutions were time-barred because the last predicate racketeering acts they were found to have agreed to commit occurred more than five years before their indictment.

Petitioners were convicted of racketeering conspiracy. In the case of conspiracies, the running of the limitations period is measured by reference to the activities of the criminal enterprise as a whole, not the particular acts with which each defendant is charged. *Hyde* v. *United States*, 225 U.S. 347, 369-370 (1912); *United States* v. *Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980). Where the conspiracy statute in question requires proof of an overt act, the statute of limitations runs from the date of the last overt act. Where the conspiracy statute in question does not contain an overt act requirement, the statute of limitations does not start to run until the conspiracy terminates or until the particular defendant withdraws from the conspiracy. See *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); *United States* v. *Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984); *United States* v. *Grammatikos*, 633 F.2d at 1023.

Contrary to the contention of Alphonse Persico, DeRoss, and Scarpati (87-1324 Pet. 60-63), the racketeering conspiracy violation in Section 1962(d) does not require proof of any overt act or proof that any predicate crime was actually committed. *United States* v. *Coia*, 719 F.2d at 1124-1125; *United States* v. *Barton*, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857 (1981). In this respect, the RICO conspiracy statute is no different from a number of other conspiracy statutes that criminalize various kinds of agreements without requiring the com-

mission of any act in furtherance of the agreement. *E.g.*, 15 U.S.C. 1 (Sherman Act conspiracy in restraint of trade); 18 U.S.C. 892, 894 (loansharking agreement); 18 U.S.C. 1951 (extortion agreement); 21 U.S.C. 846, 963 (narcotics distribution and importation agreements). These statutes contain no express overt act requirement, and the courts have declined to read into the statutes any such requirement.

Because these statutes strike at the criminal partnership itself and require no proof of any act to carry out its purposes, the crime does not terminate—and thus the relevant statute of limitations period does not begin to run—until the accomplishment or abandonment of all of the objectives of the partnership, or until a particular defendant withdraws from the conspiracy. *United States* v. *Kissel*, 218 U.S. at 608 (antitrust conspiracy); *United States* v. *Brock*, 782 F.2d 1442, 1445 (7th Cir. 1986) (narcotics conspiracy); *United States* v. *Tolub*, 187 F. Supp. 705, 709 (S.D.N.Y. 1960) (extortion conspiracy). A defendant's withdrawal from such a conspiracy may not be accomplished by merely ceasing to act; only an affirmative renunciation of the conspiracy will start the running of the statute of limitations as to a withdrawing defendant. *Hyde* v. *United States*, 225 U.S. at 369-370; *United States* v. *Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977).

Applying these principles, the district court properly rejected the statute-of-limitations challenge raised by Russo and McIntosh to their RICO conspiracy prosecutions. The criminal partnership to which Russo and McIntosh agreed continued throughout the period covered by the indictment. Particular crimes may have been abandoned or accomplished, such as the predicate acts of which Russo and McIntosh were convicted; particular conspirators might have gone to prison for a period of

time, as Russo, McIntosh and other defendants did, but the enterprise that Russo and McIntosh joined continued to be active in criminal affairs at least until the date of the indictment in this case.

Citing First Circuit and prior Second Circuit decisions,[8] Russo and McIntosh argue (87-1314 Pet. 9-10, 14; 87-6597 Pet. 17-20) that a RICO conspiracy requires an agreement on the part of each defendant to commit at least two acts of racketeering. From that premise, they argue that the statute of limitations should begin to run when agreement to commit the predicate acts is complete. Wholly apart from the validity of the premise, that argument misreads the statute. The offense created by Section 1962(d) is a conspiracy to violate the substantive RICO statute, *i.e.*, a conspiracy to participate in the affairs of an enterprise through a pattern of racketeering activities. Because the offense is the agreement to participate in the affairs of the enterprise, it does not matter, for purposes of the statute of limitations, whether Section 1962(d) also requires proof that each defendant agreed to participate in two or more predicate acts. As long as the defendant's agreement to participate in the affairs of the enterprise is still in effect, the statute of limitations does not begin to run. As the court of appeals held, it is the scope of this broader agreement that must be looked to in determining whether its purposes have been carried out or abandoned. See *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957); *United States* v. *Sarantos*, 455 F.2d 877, 882-883 (2d Cir. 1972).[9]

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[8] *E.g.*, *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Winter*, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

[9] It is for that reason that this case does not present any conflict among the circuits regarding whether a RICO conspiracy requires

3. Carmine Persico, Alphonse Persico, DeRoss, and Scarpati all claim (87-1323 Pet. 34-38; 87-1324 Pet. 46-59) that the district court committed reversible error by admitting Frederick DeChristopher's testimony about conversations he had with Carmine Persico when Persico was hiding out in DeChristopher's house. They claim that the conversations were not made during, or in furtherance of, the racketeering conspiracy charged in the indictment.[10]

The law regarding the admissibility of co-conspirator statements is clear: statements made by a co-conspirator in the course of and in furtherance of a conspiracy are admissible against all members of that conspiracy. Fed. R. Evid. 801(d)(2)(E). The district court found that the requirements of Rule 801(d)(2)(E) were satisfied here.[11]

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proof of an agreement to commit two or more predicate acts, as petitioner Russo contends (87-1314 Pet. 8-15). In his dissent, Judge Newman noted that the Second Circuit requires proof that a RICO conspiracy defendant not only joined the overall criminal enterprise conspiracy, but also agreed to commit at least two predicate acts. *United States* v. *Teitler*, 802 F.2d 606, 612-613 (2d Cir. 1986); *United States* v. *Ruggiero*, 726 F.2d at 921. He argued that a RICO conspiracy prosecution is therefore timely only where both the overall enterprise conspiracy *and* at least one of the specific conspiracies are found to have continued into the limitations period (Pet. App. 37a-38a). But as the majority found, the crime proscribed by Section 1962(d) is a conspiracy to participate in a charged enterprise's affairs, not conspiracy to commit predicate acts. Judge Newman's novel approach to the statute of limitations issue has not been adopted by the Second Circuit or any other court.

[10] Obviously, the statements were admissible against Carmine Persico as party admissions. Fed. R. Evid. 801(d)(2)(A). As to him it was not necessary to establish that they were admissible as co-conspirator declarations.

[11] After hearing extensive argument on motions at the end of the government's case (Tr. 14,915-15,036), the district court found that all

Accordingly, it held that DeChristopher's testimony relating Carmine Persico's damaging admissions was admissible. The court of appeals affirmed that finding as amply supported by the evidence. Petitioners' factbound contentions to the contrary warrant no further review.

Petitioners' claim is predicated partly on their contention (87-1324 Pet. 50-51) that the Colombo Family conspiracy ended when the original indictment was unsealed in October 1984. The proof established, however, that the arrest, conviction, or incarceration of one or several Family members never stopped the operation of the conspiracy. The intervention of law enforcement authorities, the judiciary, and the federal prison system was only a temporary inconvenience for the conspirators. Instead, other Family members took over the management of the criminal business (*e.g.*, GX 722; Tr. 12,264, 13,674), and the imprisoned Family member continued to participate in Family decisions (GX 839; Tr. 13,724) and even to commit new crimes while in prison (*e.g.*, GXs 118, 719; Tr. 13,724-13,726). In some cases, the Family even compensated the wife and children of the imprisoned Family member until he was freed to resume his activities (Tr. 10,559-10,564, 13,673, 13,719-13,720).

This pattern of perpetuating the Family's criminal objectives despite the prosecution and incarceration of Family members continued after the initial indictment in this case and was properly encompassed by the superseding indictment upon which petitioners were tried. In late October 1984, top-ranking Colombo Family leaders obtained advance information about their imminent indictment and met at a restaurant in Montauk, New York, to decide who would surrender and who would remain at large to run the

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petitioners had been shown to be members of the conspiracy by a preponderance of the non-hearsay evidence (Tr. 15,044).

Family (Tr. 13,687-13,690). The goal, as usual, was to ensure that the Family business would not be curtailed by the arrests. Carmine Persico and severed co-defendant Dominic Montemarano avoided arrest for just that reason. *Ibid.* Thus, the conspiracy charged in the indictment—to participate in the operation of the Colombo Organized Crime Family—did not end with the first arrests in this case, any more than it ended with Carmine Persico's imprisonment in 1972, his reimprisonment in 1981, co-defendant Dominic Cataldo's imprisonment in 1981, Russo's imprisonment in 1982, or McIntosh's imprisonment in 1983. In circumstances such as these, the mere imprisonment of some conspirators does not end the conspiracy.[12] See, *e.g.*, *United States* v. *Guerro*, 693 F.2d 10, 13 (1st Cir. 1982); *United States* v. *Wentz*, 456 F.2d 634, 637 (9th Cir. 1972); *United States* v. *Agueci*, 310 F.2d 817, 839 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). Accordingly, notwithstanding the fact that some conspirators had been arrested or indicted, Carmine Persico's statements to DeChristopher were made while the Colombo Family conspiracy was still in operation.

It is also clear that Persico's statements to DeChristopher were made in furtherance of the conspiracy. Fred DeChristopher already was a co-conspirator operating within the framework of the Colombo Family enterprise when Carmine Persico came to his house to hide in November 1984. DeChristopher had been involved in the Family's scheme to skim profits from the proceeds of gambling on a cruise ship (Tr. 13,677-13,680). Indeed, it was his demonstrated trustworthiness in the Family's

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[12] Although co-defendants Gennaro Langella and Dominic Cataldo were detained after their arrests in this case in October 1984, all the other defendants who were arrested on the original indictment were released on bail and remained at large throughout the trial.

criminal business that qualified him to hide Persico. The Colombo Family gave DeChristopher a salary to conceal and protect Persico (Tr. 13,682-13,683) and, as Persico got to know DeChristopher better while staying with him, Persico drew DeChristopher deeper into the conspiracy, promising him business from companies controlled by the Family (Tr. 13,684-13,685) and directing DeChristopher to stay close to Russo when Russo was released from prison (Tr. 13,685). Moreover, part of DeChristopher's role was not merely to hide Persico, but to facilitate Persico's receipt of discovery materials in this case so that Persico could decide what course of action to take in the future (Tr. 13,692-13,693).

Under these circumstances, Persico's statements to DeChristopher fit squarely within the definition of statements in furtherance of the conspiracy. Persico's statements about the conspiracy were designed to enable DeChristopher better to carry out his role, *United States* v. *Rahme*, 813 F.2d 31, 35 (2d Cir. 1983); *United States* v. *Katsougrakis*, 715 F.2d 769, 778 (2d Cir. 1983), cert. denied, 404 U.S. 1080 (1984); *United States* v. *Mangan*, 575 F.2d 32, 43-44 (2d Cir.), cert. denied, 439 U.S. 931 (1978); to inform DeChristopher of the progress of the conspiracy and to seek his assistance, *United States* v. *Rahme*, 813 F.2d at 35-36; *United States* v. *Paone*, 782 F.2d 386, 391 (2d Cir. 1986); *United States* v. *Ammar*, 714 F.2d 238, 252 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Handy*, 668 F.2d 407, 408 (8th Cir. 1982); and to advise DeChristopher about the efforts that were being made to avoid indictment or conviction, including what the Family knew about the government's investigation and its witnesses and what the conspirators could do to respond, *United States* v. *De Peri*, 778 F.2d 963, 981-982 (3d Cir. 1985), cert. denied, 475 U.S. 1110 (1986). All of those statements were in furtherance of the conspiracy

that was proved at trial and were therefore admissible under Fed. R. Evid. 801(d)(2)(E).[13]

4. Carmine Persico claims (87-1323 Pet. 39-42) that the government's financial arrangement with cooperating witness Joseph Iannuzzi amounted to a contingency fee that was so likely to induce Iannuzzi to testify falsely against petitioners that it denied Persico due process of law. As a general matter, almost all issues relating to the credibility of a government witness are left to an informed and properly instructed jury. *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966); *United States* v. *Borman*, 437 F.2d 44, 45-46 (2d Cir.), cert. denied, 402 U.S. 913 (1971). Although accomplices and former co-defendants may be more likely to implicate others to absolve themselves or reduce their potential punishment, their testimony is nonetheless competent and is not subject to exclusion because of the possibility that it may be unreliable. *Rosen* v. *United States*, 245 U.S. 467 (1918). Rather than barring such testimony outright, the courts have held that the proper course is to admit the testimony and permit vigorous cross-examination as a means to test its trustworthiness. *United States* v. *Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (en banc); *United States* v. *Hodge*, 594 F.2d 1163 (7th Cir. 1979); *United States* v. *Grimes*, 438 F.2d 391 (6th Cir.), cert. denied, 402 U.S. 989 (1971).

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[13] The district court correctly held that the statements were also admissible as declarations against penal interest pursuant to Fed. R. Evid. 804(b)(3). Persico's statements to DeChristopher, which admitted the various activities of the conspiracy and the identities and roles of co-conspirators, including Persico's own role as Boss of the Family, were statements against Persico's penal interest and therefore admissible against all conspirators under Fed. R. Evid. 804(b)(3). *United States* v. *Stratton*, 779 F.2d 820, 828-829 (2d Cir. 1985); *United States* v. *Lieberman*, 637 F.2d 95, 103-104 (2d Cir. 1980).

Even where an informant's compensation has depended upon the results of his testimony or the success of the prosecution—the so-called "contingency fee arrangement"—the courts have rejected the argument that the testimony should be excluded altogether. Instead, they have relied on the traditional safeguards of our adversary system and have left it to the jury to decide what effect, if any, a fee arrangement had on a given witness's credibility. See, *e.g.*, *United States* v. *Cervantes-Pacheco, supra*; *United States* v. *Valle-Ferrer*, 739 F.2d 545, 547 (11th Cir. 1984); *United States* v. *Civella*, 666 F.2d 1122, 1129 (8th Cir. 1981); *United States* v. *Jones*, 575 F.2d 81, 85-86 (6th Cir. 1978); *United States* v. *Jett*, 491 F.2d 1078, 1081 (1st Cir. 1974).

Persico presents no reason for the court of appeals to have departed from the authority discussed above. Nor does he dispute either that the jury was fully informed of the government's dealings with Iannuzzi, or that he had an adequate opportunity to cross-examine Iannuzzi with regard to inducements offered to him (Pet. App. 26a). Accordingly, no further review on this issue is warranted.

5. Alphonse Persico, DeRoss, and Scarpati claim (87-1324 Pet. 24-37) that the district court erred in not sequestering the jury for the entire eight-month trial. A decision not to sequester the jury, however, is a matter committed to the discretion of the trial court and will rarely be the basis for reversal. See *United States* v. *Phillips*, 664 F.2d 971, 998 n.24 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Johnson*, 584 F.2d 148, 154-155 (6th Cir. 1978), cert. denied, 440 U.S. 918 (1979); *United States* v. *Arciniega*, 574 F.2d 931, 933 (7th Cir.), cert. denied, 437 U.S. 908 (1978); *United States* v. *Hill*, 496 F.2d 201, 203 (5th Cir. 1974).

The sequestration motion in this case was made orally during jury selection, not on behalf of all defendants, but

on behalf of Ralph Scopo, who later was severed from the case (Oct. 31, 1985, Tr. 22-25). It was explicitly opposed by counsel for Scarpati on the ground that a sequestered jury would be hostile to the defendants (*id.* at 31-34), and it was explicitly joined only by counsel for Russo and McIntosh (*id.* at 31). Thus, if the jury had been sequestered for eight months and had convicted the defendants, some of these petitioners undoubtedly would have urged reversal because the jury was sequestered. See *United States* v. *Walton*, 602 F.2d 1176, 1179 n.1 (4th Cir. 1979). The district court denied the motion, citing the "enormous burden on the jurors" of being confined to a hotel for the entire duration of the trial (Oct. 31, 1985, Tr. 25).

Instead, the district court took elaborate precautions to ensure that the jury would not be tainted by publicity about the trial. These measures began with an unusually extensive voir dire, which included a detailed questionnaire, oral exploration of the prospective jurors' attitudes about the Mafia, and daily directions to the jury instructing them to insulate themselves from publicity. The district court instructed the jurors to read no newspapers or magazines other than redacted ones supplied by the court. The careful clipping by the United States Marshals Service of all potentially prejudicial articles in the newspapers and the district judge's admonitions to the jurors to avoid viewing, listening to, or reading anything in the media about this case continued throughout the trial. The district judge gave additional and specific admonitions and conducted individual voir dires of the jury as events warranted. Contrary to petitioners' unsupported assertions (87-1324 Pet. 27-37), there is no evidence to suggest that the jury was exposed to any prejudicial publicity. Instead, as the court of appeals concluded (Pet. App. 29a), the trial court's handling of the matter "helped pro-

tect [petitioners] rights to a fair trial and [was] a sensible response to the circumstances presented by this trial."[14]

6. Petitioners' remaining contentions require only brief response. The district court carefully considered and rejected Carmine Persico's claim (87-1323 Pet. 26-33) of government misconduct. 646 F. Supp. at 754-756. In 1977, a Persico associate twice asked the IRS undercover agent to have Persico brought from the United States Penitentiary in Atlanta, Georgia, where he was serving a sentence for hijacking, to New York so that his colleagues could meet with him. In response, the Justice Department on two occasions obtained writs of habeas corpus ad testificandum for Persico, and Persico was produced in New York. On both occasions, Persico's representatives paid bribes to the agent. Persico now contends that the government invented the crimes and plucked him from his prison sanctuary in order to involve him in those crimes. The district court found, however, that Persico had waived that claim by pleading guilty to the resulting bribery charges (*id.* at 754-755), and that in any event Persico had not produced any evidence that the government acted improperly, despite being given an ample opportunity to do so at trial (*id.* at 755-756).[15]

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[14] Petitioners make the somewhat inconsistent argument that the district judge should not have sequestered the jury for their deliberations (87-1324 Pet. 32-39). They cite no authority to forbid this traditional exercise of a trial court's discretion for extra protection from outside influence during the period of deliberations.

[15] *United States* v. *Caputo*, 633 F. Supp. 1479 (E.D. Pa. 1986) (dismissing counts and suppressing evidence because of a grand jury subpoena issued to an undercover agent in a pseudonym under which the agent was working), upon which Persico relies to support his claim, was reversed *sub nom. United States* v. *Martino*, 825 F.2d 754 (3d Cir. 1987). The court of appeals concluded that the subterfuge was

Alphonse Persico claims (87-1324 Pet. 40-45) that he was not aware, when he paid Joseph Iannuzzi to influence the Bureau of Prisons, that Iannuzzi would be bribing a government official. As the district court found (646 F. Supp. at 757-758), however, a series of recorded telephone conversations amply demonstrated that Alphonse Persico participated in the bribery scheme with full knowledge that a government official was involved.

Finally, Carmine Persico asserts (87-1323 Pet. 43-44) that the jury was erroneously instructed that the predicate acts supporting the RICO counts need not be in furtherance of the overall enterprise, and that "[t]he jury was given the impression that [conviction was proper] as long as they found that the acts were committed, whether or not they were isolated or in furtherance of the enterprise * * *." The record refutes that claim; the jury was in fact instructed that there must be "a meaningful connection between the defendant's illegal acts and the affairs of the enterprise," and that the government had to prove that "the two or more racketeering acts had some impact or effect on the affairs of the enterprise, and that [the defendant's] position or involvement in the affairs of the enterprise facilitated his commission of the racketeering acts" (Tr. 17,577-17,579).

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necessary to protect the ongoing undercover investigation and did not constitute either prosecutorial misconduct or the type of outrageous conduct necessary to support a due process violation.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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